Nos. 07-826 and 07-850

In the Supreme Court of the United States

KENNETH J. GRAHAM, PETITIONER

v.

UNITED STATES OF AMERICA

KYLE DRESBACH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a prosecutor's duty to disclose exculpatory evidence extends to materials within the exclusive control of a cooperating co-conspirator who is not acting on behalf of the government.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 484 F.3d 413.* The order of the district court denying petitioners' motion for a new trial (Pet. App. 23a-52a) is unreported.

* Unless otherwise noted, all references to "Pet." and "Pet. App." are to the petition and appendix in No. 07-826.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 2007. A petition for rehearing was denied on September 18, 2007 (Pet. App. 53a). The petition for a writ of certiorari in No. 07-826 was filed on December 17, 2007. The petition for a writ of certiorari in No. 07-850 was not filed until December 18, 2007, and is out of time under Rule 13.1 of the Rules of this Court. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioners were convicted of one count of conspiracy to commit mail fraud and to subscribe false tax returns, in violation of 18 U.S.C. 371; one count of conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h); and two counts each of money laundering, in violation of 18 U.S.C. 1957, and subscribing a false income tax return, in violation of 26 U.S.C. 7206(1). C.A. App. 72-73, 80-81. Petitioner Graham was sentenced to 75 months of imprisonment, and petitioner Dresbach was sentenced to 58 months of imprisonment. *Id.* at 74, 82. The court of appeals affirmed. Pet. App. 1a-22a.

1. Graham was the chief executive officer of Thyssen, Inc. (Thyssen), a steel-processing company headquartered in Detroit, Michigan. Pet. App. 3a. Dresbach was Thyssen's executive vice president. *Ibid.* Between 1991 and 2001, petitioners conspired to defraud Thyssen of $6.5 million in a kickback scheme by which they caused the company to buy equipment at inflated prices, funneled the proceeds of their scheme through an equipment broker, and then routed the money through ac-

counts set up and maintained by co-conspirator Jerome Allen, an accountant and attorney who had represented petitioners. *Ibid.*; see *id.* at 31a-35a.

2. Before petitioners were indicted, Allen agreed to cooperate with the government as part of a plea agreement. Pet. App. 4a. Once Graham was indicted, his attorney requested that Allen produce all of Graham's files and records. *Ibid.* Allen's attorney delivered five boxes, which, he said, contained all of the files and records in Allen's possession that related to Graham. *Ibid.* That representation was not accurate, and the inaccuracy surfaced when prosecutors interviewed Allen in preparation for petitioners' trial. According to the notes of one of the prosecutors, during that interview, Allen informed the prosecution team that he had certain files relating to Graham that had not been turned over to Graham's attorney. *Ibid.*

After the interview, the government sent a letter to Graham's counsel, erroneously indicating that copies of the prosecutor's interview notes were enclosed. Pet. App. 4a-5a. The day before trial was scheduled to begin, Graham's counsel informed the government that its letter had omitted the notes of the Allen interviews. *Id.* at 5a. That day, the government provided counsel with copies of the notes, and the district court granted a two-day adjournment to allow counsel to review them. *Ibid.* On the first day after the adjournment, Graham moved for dismissal of the charges, alleging prosecutorial misconduct in Allen's retention of old files relating to petitioner. *Ibid.* The district court denied the motion to dismiss, and the trial started that day. *Ibid.*

During the trial, the government learned that Allen still had copies of Graham's old tax returns. C.A. App. 2364. When Allen's attorney delivered the returns, he

also produced copies of four promissory notes that purportedly documented loans Allen supposedly had received from Graham's wife in the early 1990s. *Id.* at 2365-2366. The government reported the disclosure to Graham's counsel, and Allen ultimately produced 15 boxes of files relating to Graham. Pet. App. 28a. Graham moved for a mistrial, which the district court denied. *Ibid.*

3. The jury returned a verdict of guilty on all counts, and petitioners moved for a new trial, arguing that the government had violated its obligation under *Brady* v. *Maryland*, 373 U.S. 83 (1963), to disclose exculpatory evidence. The district court denied the motions. Pet. App. 23a-52a. The court concluded that *Brady* does not extend "to evidence which is in the exclusive control of a cooperating witness and of which the government's knowledge is not certain." *Id.* at 29a. The court explained that it was "not convinced that the government knew or should have known of the existence—or contents—of the fifteen boxes of files." *Ibid.* Indeed, the court noted, "Graham had the same access to the Allen files as did the government." *Ibid.* The court also found that the evidence in the files was not material to Graham's defense: "[t]his Court's confidence in the fairness of the trial and in the verdict rendered by the jury has not been undermined by the newly discovered evidence." *Id.* at 41a. Finally, the court determined that Dresbach's *Brady* claim lacked merit because "the evidence contained in the Allen files, which pertained only to Graham, would not have bolstered Dresbach's case." *Id.* at 43a-44a.

4. The court of appeals affirmed. Pet. App. 1a-22a. The court held that petitioners had "not shown any withholding of evidence within the control of the Govern-

ment." *Id.* at 7a. "*Brady* clearly does not impose an affirmative duty upon the government to take action to discover information which it does not possess." *Ibid.* (quoting *United States* v. *Beaver*, 524 F.2d 963, 966 (5th Cir. 1975), cert. denied, 425 U.S. 905 (1976)). Here, the court found it "undisputed that the evidence was in the personal control of Allen until he disclosed it to all parties late in the trial." *Ibid.* The court also reasoned that the government did not exercise control over Allen merely because he was a cooperating witness: "While cooperating with the Government pursuant to the terms of his plea agreement, Allen remained an independent actor." *Id.* at 8a.

Judge Batchelder dissented. Pet. App. 19a-22a. In her view, the government "was fully aware * * * that Allen had more of Graham's files," *id.* at 20a, and the government should have sought to examine those files, because a "prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case," *ibid.* (quoting *Kyles* v. *Whitley*, 514 U.S. 419, 437 (1995)).

ARGUMENT

Petitioners contend that a prosecutor has an obligation under *Brady* v. *Maryland*, 373 U.S. 83 (1963), to seek out exculpatory evidence in the possession of an independent, non-governmental witness who has entered into a cooperation agreement with the government. The court of appeals correctly rejected that claim, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Graham contends (Pet. 19-22) that the court of appeals contravened this Court's precedents governing

the scope of a prosecutor's duty to discover and disclose information favorable to the defense. That is incorrect. To assert a successful claim under *Brady*, Graham had to establish (1) that the evidence at issue was favorable to him; (2) that it was suppressed by the prosecution; and (3) that he suffered prejudice as a result. See *Strickler* v. *Greene*, 527 U.S. 263, 281-282 (1999). The district court noted that suppression under *Brady* requires either actual or constructive possession by the government, and it concluded that "[i]f there was a suppression in this case, it was Allen's doing, not that of the government, and *Brady* does not extend to his activity." Pet. App. 29a-30a. The court of appeals agreed, ruling that "the record here does not support Graham's contention that Allen was in effect a government agent." *Id.* at 8a.

Graham interprets (Pet. 20-22) the decision of the court of appeals as limiting to law-enforcement personnel this Court's statement in *Kyles* v. *Whitley*, 514 U.S. 419 (1995), that prosecutors have a duty to learn of exculpatory evidence possessed by "others acting on the government's behalf in the case." *Id.* at 437. But the court of appeals did not so limit *Kyles*. Instead, it determined that "[e]ven if the scope of the prosecutor's liability in theory could extend to a cooperating witness if that witness were sufficiently identified with the prosecution team (a question that we do not reach in this case), the record does not support Graham's contention that Allen was in effect a government agent." Pet. App. 8a. In other words, rather than limiting the category of "others acting on the government's behalf," the court simply concluded, based on the evidence in this case, that Allen was not acting on behalf of the government.

The fact-bound determination of the court of appeals does not warrant this Court's review, but in any event, it is fully supported by the record. Pet. App. 8a-9a. The prosecutors did not have unrestricted access either to Allen or to his files; rather, he was "an independent actor," at arm's length with the government. *Id.* at 8a. Even though Allen was testifying at trial pursuant to a cooperation agreement with the government, the prosecutors had to obtain approval from Allen's attorney before interviewing him and had to serve a subpoena on him in order to review his files. *Id.* at 8a-9a. And even after receiving such subpoenas, Allen declined to produce materials that he considered to be covered by the attorney-client privilege. *Id.* at 9a.

Moreover, the prosecutors were not privy to discussions between Allen's and Graham's counsel over the demand that Allen produce all files relating to Graham. C.A. App. 2677. Indeed, Graham worked to prevent disclosure of the Allen files: on various occasions during the proceedings, he accused the prosecutors of invading the attorney-client privilege in connection with their review of documents from the files. *Id.* at 1177. And while Graham received copies of all documents that Allen turned over to the government, he also received additional records from Allen that were not provided to the government. *Id.* at 2400-2401.

Although Allen had contractual obligations under his plea agreement, those duties did not place him in the position of a subordinate with respect to the prosecutors. In fulfilling his obligations as a cooperating witness, he was not acting on the government's behalf for purposes of *Brady*. He did not engage in undercover operations or serve as a confidential informant. Rather, he simply provided testimony under a plea agreement.

Thus, under these circumstances, the prosecutors cannot reasonably be said to have possessed authority or control over Allen. The court of appeals was therefore correct to hold that the prosecutors were not required to discover the records in Allen's custody. Graham does not allege that any other court of appeals would have reached a different result on these facts.

Graham contends (Pet. 20) that the government issued a "directive" to Allen that before any records were turned over to the defense, the prosecution had to review them first. As the court of appeals explained, however, while the government apparently desired to review old files that Allen might turn over to Graham, the record "does not show * * * that the Government actually had possession of the fifteen boxes at issue here," and "[i]t was not until Allen produced the fifteen boxes during trial that either party had any knowledge of their contents." Pet. App. 9a.

Graham also asserts (Pet. 21) that Allen functioned as a "government agent-without-portfolio," who "was covertly providing information to the prosecution about his client Mr. Graham" while cooperating in the criminal investigation. The characterization is not accurate. As the court of appeals observed, "there is no evidence in the record that Allen did anything other than review the Government's evidence of the kickback scheme and agree to plead guilty and cooperate." Pet. App. 9a-10a.

2. Graham also contends (Pet. 23-26) that the decision below contravenes this Court's decisions establishing the right of the defense to rely on representations by the prosecutor that all *Brady* material has been disclosed. According to Graham (Pet. 23), the government falsely represented "that Allen had produced all the documents he possessed and that, in turn, [the government]

had nothing the defense did not have." Graham offers no support for that assertion, and in fact, the government told Graham and the court that it had *not* seen all of Allen's files: "Now, after the indictment, we later learned that Mr. Allen returned all of his files that related to Mr. Graham back to [Graham's counsel]. He didn't show them to us. * * * As far as we know, your Honor, [Allen's client files relating to Graham] were all turned over by Mr. Allen to Mr. Graham prior to our review. * * * I'm sorry, we never reviewed them." C.A. App. 1173-1174. That statement put Graham on notice that the government had not seen Allen's client files and had only limited knowledge of their contents.

Graham knew far more than the government about the extent of the legal and financial services he had received from Allen. In the court of appeals, Graham admitted that he "had long contended that Allen possessed all of his historical banking, legal and tax records." Graham C.A. Br. 53. Graham was Allen's client, and given the duration and extent of their professional relationship, Graham must have known that the five boxes of files that Allen produced before trial covered only a fraction of Allen's legal representation of him.

It is well settled that a defendant cannot sustain his burden of establishing suppression by the prosecution if, in the exercise of ordinary diligence, he himself could have acquired the evidence in question. See, *e.g.*, *United States* v. *Corrado*, 227 F.3d 528, 538 (6th Cir. 2000); *Hoke* v. *Netherland*, 92 F.3d 1350, 1355 (4th Cir.), cert. denied, 519 U.S. 1048 (1996). Here, the record establishes that petitioner's counsel elected not to subpoena Allen for "any and all records or anything like that." C.A. App. 2402. Instead, counsel merely asked Allen's attorney to turn over his files relating to petitioner, and

he assumed that the five boxes he received constituted "everything," *id.* at 2417, 2420-2421, even though the receipt that he signed upon delivery of the boxes did not represent that those boxes included everything, *id.* at 2416-2417.

The district court remarked repeatedly that Graham's counsel had demonstrated a lack of diligence in failing to subpoena Allen before trial for any and all records in his possession relating to Graham. C.A. App. 2420-2421, 2439-2440. The court observed that the 15 Allen boxes on which Graham now bases his *Brady* claim were produced in response to a mid-trial subpoena, and the court noted that the same subpoena could have been issued at least a year earlier. *Ibid.* The court concluded that Graham's complaints of late disclosure were rooted in "defense preparation rather than prosecution misconduct." *Id.* at 2439. In denying Graham's motion for a new trial, the court remarked that it was "not persuaded by Graham's argument that he could not have discovered the files sooner with due diligence." Pet. App. 42a-43a. Graham's lack of diligence defeats his claim under *Brady*.

3. Even if the issues raised in Graham's petition otherwise warranted review, this case would be a poor vehicle for considering them because the judgment of the court of appeals could be affirmed on the alternative ground that the evidence in Allen's files was not material. Although the court of appeals had no occasion to reach the issue, Pet. App. 10a, the district court conducted a detailed review of the allegedly exculpatory evidence, and it concluded that the exclusion of that evidence did not undermine confidence in the fairness of the trial and the jury verdict, *id.* at 30a-41a. Graham has not shown that the court's finding was erroneous,

nor would that case-specific question warrant review in any event.

4. Dresbach's petition should be denied on the ground that it is untimely. The court of appeals denied rehearing on September 18, 2007. 07-850 Pet. 1. Under Rule 13.1 of this Court, a petition for a writ of certiorari had to be filed within 90 days of that date, that is, by Monday, December 17, 2007. Dresbach's petition was not filed until December 18. Although this Court has discretion to consider an untimely petition for a writ of certiorari in a criminal case, see *Schacht* v. *United States*, 398 U.S. 58 (1970), petitioner's only explanation for the untimeliness is that "counsel miscalculated the date on which [the petition] was due." 07-850 Pet. 1 n.1. Accordingly, this Court should decline to exercise its discretion to review the petition. Cf. *Schacht*, 398 U.S. at 65 (excusing delay where petitioner filed a motion and affidavits showing that he "had acted in good faith and that the delay in filing the petition for certiorari was brought about by circumstances largely beyond his control").

In all events, Dresbach's claim lacks merit. Dresbach's argument rests (07-850 Pet. 6-7) entirely on Graham's *Brady* claim. But Dresbach has no basis to join in that claim, because he cannot demonstrate any connection to the allegedly suppressed evidence. As the district court explained, "the evidence contained in the Allen files, which pertained only to Graham, would not have bolstered Dresbach's case." Pet. App. 43a-44a.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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